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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLIFTON M. McCLURE,
Petitioner,

v.

UNDERSEA INDUSTRIES, INC., a corporation d/b/a SCUBAPRO AND JOHNSON DIVERSIFIED, INC., a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The Court has ruled that antitrust treble-damage plaintiffs who have proved a violation are excused from an unduly rigorous standard of proving antitrust injury. The principal prerequisite to a finding of injury is that the nature of the violation proved would have had a tendency to cause the plaintiff's loss. Having established this probable causal connection, the plaintiff need only put on sufficient evidence tending to show a reasonable estimate of his loss of profits. The defendant bears the burden of proving that the loss was wholly attributable to other causes. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures, Inc.* 327 U.S. 251 (1946). The courts of appeals are divided on the issue of proper application of this rule in cases involving concerted refusals to deal under Section 1 of the Sherman Act.

Question 1. Does a treble-damage antitrust plaintiff satisfy his burden of proof of impact by showing a concerted refusal to deal with him and a decline in sales and profits not entirely attributable to other causes or, as the court below held, does he have the additional burden to prove such a negative as a lack of alternative supply?

Question 2. In reviewing a jury verdict favorable to a treble-damage plaintiff, does a reviewing court have a duty to find the fact of violation as a necessary predicate to finding impact, or, might a reviewing court, as did the court below, determine, in isolation, only fact of impact?

It is axiomatic that in reviewing a favorable judgment, courts must view the record and reasonable inferences to be drawn from it in a light most favorable to the verdict-winner. *See Galloway v. United States*, 319 U.S. 372 (1943). There is division among the courts of appeals,

however, on the question of which portion of the evidence a court is to consider. *Schwimmer v. Sony Corp. of America*, —— U.S. ——, 103 S.Ct. ——, 1089 ATRR 906 (Nov. 8, 1982) (White, J. dissenting from denial of certiorari.)

Question 3. In reviewing a jury verdict favorable to a treble-damage plaintiff, does a reviewing court have an obligation to give the plaintiff the full benefit of all his proof and consider only the evidence that supports the plaintiff?

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CLIFTON M. McCLURE,

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UNDERSEA INDUSTRIES, INC., a corporation d/b/a SCUBAPRO AND JOHNSON DIVERSIFIED, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Clifton M. McClure, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, pp. 1a-8a) is reported at 671 F.2d 1287. The *per curiam* opinion of the court of appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (Pet. App. B, *infra*, pp. 9a-11a) is reported at —— F.2d ——, 1982-2 Trade Cases ¶ 64,940.

JURISDICTION

The judgment of the court of appeals reversing the district court's judgment and order denying respondent's motion for judgment notwithstanding the verdict (Pet. Apps. C and D, *infra*, pp. 12a and 13a-14a) was entered on March 29, 1982. A timely petition for rehearing and

suggestion for rehearing *en banc* was filed by petitioner and denied in a *per curiam* opinion of the court of appeals on September 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

Scuba diving is a growing recreational activity in the United States. A Scuba diver's outfit, similar to a skier's, consists of several pieces of equipment, each of which serves a discrete purpose. The equipment includes regulators, fins, tanks, valves, gauges, face masks, flotation vests, snorkels, wetsuits and other diving apparel. Although there are approximately seventy scuba diving equipment manufacturers, the industry is highly concentrated. The five leading full-line manufacturers account for some 73.2 percent of sales. (T.R. 2357)[1] Of these five,

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[1] "T.R." refers to the trial record in the district court.

the respondent,[2] whose products are marketed under the Scubapro brand name, ranks second. Among scuba divers, the Scubapro brand name has acquired substantial goodwill, owing to the equipment's well-deserved reputation for superior quality and product design. (T.R. 2326-2329)

During the relevant period, the respondent marketed Scubapro equipment through a network of franchised dealers located throughout the United States. These dealers, about 500 in number, were all professional diving shops. The respondent refused to market Scubapro equipment through discount department stores and mail order houses.

In 1969, McClure became an authorized dealer in Huntsville, Alabama when he signed the Statement of Mutual Agreement Between Scubapro and Authorized Scubapro Dealers. (Pet. App. E, *infra*) As such, McClure carried a wide assortment of Scubapro diving equipment including the items referred to above and, additionally, replacement parts for repair of certain items. Following a period of alleged declining purchases of Scubapro equipment and rising purchases of other brands of scuba diving equipment, McClure lost his Scubapro franchise on June 9, 1977. (App. A, p. 2a)

After his Scubapro franchise had been terminated, McClure remained a scuba diving equipment dealer. He placed orders with the respondent for replacement parts and other equipment. These orders were never acknowledged.[3] Although McClure acquired some Scubapro equipment from authorized dealers with whom he had enjoyed

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[2] The respondent is a wholly-owned subsidiary of Johnson Wax Associates, Inc., Racine, Wisconsin, successor-in-interest to Johnson Diversified, Inc. which was voluntarily dismissed from the complaint.

[3] Respondent's chief executive, Richard Bonin, admitted these orders were received but respondent refused to acknowledge them because petitioner was no longer an authorized dealer. (T.R. 3078, 3092, 276)

a previous professional relationship,[4] in December 1977 and January 1978, McClure contacted several authorized dealers who refused to sell to him. Thereafter, on February 2, 1978, McClure filed this lawsuit against the respondent. (App. A, p. 2a)

The complaint, filed under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleged that the respondent (1) terminated McClure's dealership as part of a conspiracy to restrain trade, prevent competition and an attempt to monopolize trade in scuba diving equipment in violation of Sections 1 and 2 of the Sherman Act; (2) engaged in a conspiracy to restrain trade by fixing resale prices; and (3) engaged in a conspiracy with authorized dealers to boycott McClure by refusing to deal with him after his termination. (App. A, pp. 2a-3a) At the trial, which began on February 4, 1980, McClure offered proof that the respondent and authorized dealers had agreed to fix retail prices of Scubapro equipment and to maintain control of such prices by barring transshipment of Scubapro equipment from authorized dealers to unauthorized dealers. (App. E, pp. 15a-18a)[5] McClure also offered evidence showing enforcement of this agreement. The principal proof of enforcement was dealer testimony concerning surveillance and "shopping" of dealers who were suspected of discounting and the tracing of serial numbers of warrantied Scubapro equipment back to dealers who had been suspected of transshipping such equipment to unauthorized dealers.[6] Finally, McClure offered proof

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[4] Petitioner had been active in scuba diving instruction clinics and other industry activities where he became friendly with some Scubapro dealers. (T.R. 667-668)

[5] For example, former dealer Stenchfield testified that respondent's policies toward dealers had always been the same, that is "no discounting, no transshipments and you pay the consequences for it." (T.R. 1461) Former dealer Shuler testified that respondent did not want transshipment between an authorized dealer and an unauthorized dealer; respondent controlled the prices. (T.R. 2301)

[6] Dealer Ashburn testified that he had shopped Mr. Shuler's store, bought some Scubapro equipment and transmitted the serial number

that the respondent threatened to and in some cases actually did terminate authorized dealers who had discounted Scubapro equipment or had transshipped it to unauthorized dealers. (T.R. 1101-1102, 1357, 1458, 2275, 2298)

The respondent countered with proof that, despite the alleged boycott, four authorized dealers had sold Scubapro equipment to McClure after his termination at prices and terms of delivery equal to respondent's. (App. A, pp. 6a-7a)[7] In addition, the respondent offered deposition testimony of certain authorized dealers that they would have sold additional Scubapro equipment to McClure if he had asked. (App. A, p. 7a) However, the respondent put on no evidence to substantiate the fact that those dealers could or would have filled McClure's orders during the period when several authorized dealers refused to sell to him. On the other side, McClure did offer direct and circumstantial evidence that, as a result of the group boycott (1) several authorized dealers refused to deal with McClure and other unauthorized Scubapro dealers, (App. A, p. 2a; T.R. 860, 1101-1104, 1106) (2) shipments of Scubapro equipment in quantities sufficient to meet McClure's demand had been restricted,[8] (3) timely shipment

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to respondent who used it to trace the equipment to former dealer Dale Stone who had been transshipping it to Mr. Shuler. Stone was terminated by respondent for this activity. (T.R. 2273-2275) Respondent's Mr. Bonin admitted that he had traced serial numbers on equipment sold by unauthorized dealers. (T.R. 1637-1639)

[7] The court below found it significant that petitioner had purchased more Scubapro equipment in the latter half of 1977, after termination, than he had in the first four months of 1977. The court apparently was unmindful that scuba diving is a seasonal sport. Respondent's Mr. Bonin admitted, however, that January through March are certainly not as good for scuba diving as the Summer. (T.R. 1754-1755)

[8] Petitioner's wife, who participated in petitioner's business, testified that petitioner was limited by what the dealers who defied the boycott had in stock; that none of them stocked enough to fulfill petitioner's needs. (T.R. 1312, 1314)

of Scubapro replacement parts had been impeded, (T.R. 329, 2526) (4) the danger that serial-numbered equipment such as regulators would be traced back to the originating dealer and his franchise terminated prevented substantial purchases or resales of such equipment by unauthorized dealers,[9] and (5) McClure's sales and profits from the sale of Scubapro equipment declined severely by comparison with previous periods. (T.R. 304-438) Except for proffering evidence aimed at showing it had not engaged in a group boycott, the respondent made no attempt to prove that McClure's loss of sales and profits was attributable to unrelated causes such as mismanagement. Rather, the respondent attempted to show that McClure's overall performance had improved after termination.

After the close of McClure's evidence, the district court directed a verdict against McClure on the attempted monopolization, dealer termination and price fixing causes of action, the latter because McClure had failed to prove fact of injury. (App. A, p. 4a-5a) The respondent's motion for directed verdict on the boycott conspiracy claim was denied, and the case went to the jury on this claim only.

The district court properly instructed the jury as to the nature of the group boycott violation it must find; that the jury also must be satisfied by a preponderance of the evidence that the alleged conspiracy was material in causing concrete and determinable injury to McClure's business; and further that McClure must provide some indication of the amount of damage already done. (App. A, p. 6a) The jury returned a verdict in favor of McClure for $20,000 single damages, far less than the $902,000

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[9] See footnotes 5 and 6, *supra*. Former dealer Stone testified that after his termination, a Scubapro dealer in Savannah, Georgia sold him serial-numbered equipment but Stone did not resell it because he "didn't want to get him axed." (T.R. 2291) Petitioner and Mrs. McClure also referred to the same problem. (T.R. 296, 1314)

damages he had requested. (T.R. 2388) After trebling the damages, the district court also awarded McClure attorney's fees and costs of $85,000.

The court of appeals unanimously reversed the jury verdict for McClure. The court acknowledged that almost immediately prior to filing suit, McClure had contacted several dealers who refused to sell to him. (App. A, p. 2a) In the court's view, however, evidence that McClure had neglected to contact other dealers who earlier had offered to sell him additional Scubapro equipment was fatal to his claim of injury. (App. A, p. 7a) The court concluded that there was an absence of evidence "other than McClure's and his wife's own allegations," to infer injury specifically from the alleged boycott. (App. A, p. 8a) Thus, the court held that McClure had failed to meet the requirement of Section 4 of the Clayton Act, that an antitrust plaintiff must prove, in addition to violation, the fact of damage and some indication of the amount of damage done.

REASONS FOR GRANTING THE PETITION

1. While the Court has developed the general standards of proof for establishing injury and damages in private antitrust litigation, *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), it has yet to decide whether, in order to prove the fact of injury (impact), a plaintiff in a market exclusion case must additionally bear the burden of proof that despite evidence of repeated refusals (a) it also attempted to deal with alternative suppliers of comparable products *and* (b) its attempts to obtain comparable products in sufficient quantities were futile.

This issue is of signal importance because such an unduly rigorous standard undermines the relaxed proof of injury standard previously enunciated by the Court. Further, it is likely to give no small comfort to antitrust defendants in pending and future market exclusion cases. A requirement that the plaintiff disprove its ability to have dealt with all potential suppliers of comparable products will inevitably protract and increase the complexity of proof in treble damage antitrust cases. It will likely deter private litigants from bringing the very cases that Congress intended to deter antitrust violations. Beyond that, in cases involving products sold through large networks of franchised dealers or distributors, plaintiff's burden will become impossible to meet if it means showing that not one of hundreds of franchisees would deal with him. On the other side, the defendant will be encouraged to locate one or more docile franchisees to testify —after the fact—that "if the plaintiff had only called on me, I would have sold him anything he wanted to buy." In sum, the unduly rigorous standard applied by the court of appeals in this case will impede vigorous private enforcement of the antitrust laws by threatening to deprive the plaintiff of the treble damage incentive that counterbalances the difficulty of maintaining such expensive and time consuming litigation. *See American Society of Professional Engineers, Inc. v. Hydrolevel Corp.*, —— U.S. ——, 102 S.Ct. 1935, 1947 (1982).

Review is also merited because there is a conflict among the courts of appeals on this question. The Eighth Circuit has taken a position similar to that of the court below, holding that "[o]ne cannot show 'fact of injury' by alleging he did not receive something when he initially never tried to obtain it." *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 893-94 (8th Cir. 1979). These decisions conflict squarely with the Fifth Circuit's recent decision in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir.), *cert. denied*, 102 S.Ct. 975 (1981), holding that once the injured party has shown a con-

certed refusal to deal affecting him, the burden of proof shifts to the defendant who then bears the burden of disproving damages by establishing that alternative suppliers "could or would have sold [the plaintiff] the needed product in sufficient quantities . . . ." A similar approach has been adopted by the Fourth Circuit. Reversing a district court decision (1972-2 Trade Cases ¶ 62,886 (E.D. Va. 1979)) which had relied heavily on *Admiral Theatre Corp. v. Douglas Theatre Co., supra*, the Fourth Circuit held that from evidence of a concerted refusal to deal, the jury could infer that further efforts to acquire comparable products in sufficient quantities would have been futile. *Wilder Enterprises, Inc. v. Allied Artists Pictures*, 632 F.2d 1135, 1142 (4th Cir. 1980).

The conflict between the courts of appeals is a fundamental one, going to the very meaning of the term fact of injury. The court below and the Eighth Circuit implicitly hold the view that impact and amount of damage are inextricably bound together. In practical effect, these courts separate the analysis of violation from that of impact and damages. Thus, the nature, intent, and probable consequences of the antitrust violation are of minimal importance to their analysis of impact, the primary focus being upon the amount of damages suffered by the plaintiff. By contrast, the Fourth and Fifth Circuits' determination of fact of injury is closely intertwined with the nature, intent, and probable consequences of the antitrust violation. Thus, if the violation by natural consequence or intent aimed at a group of businessmen or consumers of which the plaintiff was a member, and he was hit (even slightly), his burden of proof of impact has been satisfied, and the analysis then turns to the amount of damages suffered by the plaintiff. Under this approach, the fact of injury and the amount of damage are mutually exclusive concepts. The fact of injury simply relates to a litigant's standing to sue.

Story Parchment Co. v. Paterson Parchment Paper Co., supra, is the first modern case in which the Court touched upon the fact of injury question in antitrust cases. In *Story Parchment* the defendants combined to monopolize trade in parchment paper by depressing prices of their products below the point of fair profit; indeed, below the cost of production. The Court held that "the natural and probable effect" of the antitrust violation was to "destroy normal prices," so that if earlier prices had been fair and reasonable a plaintiff could recover for the difference in price. 282 U.S. at 561.

The next case in which the Court addressed the injury question was *Bigelow v. RKO Radio Pictures, Inc., supra.* There, the plaintiff motion picture exhibitor established that certain motion picture distributors and exhibitors conspired to allow those exhibitors to secure feature pictures in advance of plaintiff and other independent exhibitors. The plaintiff contended that as a result of the conspiracy, it was prevented from securing pictures for exhibit in its theatre until after the preferred exhibitors had been able to show them in the earlier and more desirable runs, thereby discriminating against the plaintiff in favor of its competitors. The Court articulated the minimal showing necessary to show injury as follows:

> [I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their *tendency* to injure plaintiffs' business, and from the evidence of decline in prices, profits and values, not shown to be attributable to other causes, that, defendants' wrongful act had caused damage to the plaintiffs.

327 U.S. 251, 264 (1946) (emphasis added).

In *Bigelow,* the Court also intimated that the defendant has the burden of showing the injury was attributable to causes other than those asserted by the plaintiff. The decision strongly suggests that the principal prerequisite

to a finding of impact is that the nature of the violation proved would have had a natural tendency to create the circumstances leading to the plaintiff's loss of profits. Having established this probable causal connection, the plaintiff need only put on sufficient evidence tending to show his loss of profits. It then remains for the defendant to persuade the jury that the loss of profits was attributable entirely to a cause unrelated to the conspiracy.

Again in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, the Court had occasion to rely on the *Bigelow* language quoted above. 370 U.S. 690, 697 n.7. There the Court found "sufficient evidence for a jury to infer the necessary causal connection between" the plaintiff's business failure and a conspiracy controlling the supply of vital raw material. *Id.* at 700. Significantly, the Court countenanced the principle recognized by the Ninth Circuit in antitrust cases that "where the plaintiff proves a loss, and a violation . . . of such a nature as to be likely to cause that type of loss, . . . the jury . . . must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." *Id.* at 697.

The nature, intent, and probable consequences of an antitrust violation were also instrumental in showing impact in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*. Zenith proved that a Canadian patent pool refused to award licenses to importers. The purpose of the pool was to protect the Canadian manufacturers from competition by American and other foreign companies seeking to export their products into Canada. 395 U.S. 100, 115. As a result, Zenith was unable to obtain a license. Beyond that, the pool engaged in a vigorous campaign to discourage dealings with unlicensed foreign merchandise. Consequently, Zenith never made any headway in the Canadian market during the conspiracy period. *Id.* at 118. The Court concluded that Zenith's mere

inability to obtain a patent license had an impact on Zenith and constituted an injury to its business. *Id.* at 120. Making clear that proof of injury is only a threshhold inquiry before assessing damages the Court noted that: "[The plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. . . ." *Id.* at 114 n.9 (emphasis in original).

Recently, the Court discussed the impact requirement in antitrust cases in *J. Truett Payne Co. v. Chrysler Motors Corp., supra.* That case was instituted under Section 2(a) of the Robinson-Patman Act, an incipiency statute, requiring no showing of actual injury to competition to constitute a violation. The plaintiff sought automatic treble damages in the amount of the price discrimination. In rejecting automatic damages, the Court undertook a review of its earlier decisions with respect to the plaintiff's burden in establishing its right to damages in private antitrust litigaton. Implicitly, the principal concern in *Truett Payne* was that the paucity of evidence made it too difficult to determine whether the violation as alleged could reasonably have caused the damages claimed by the plaintiff. The court below had bypassed the question of whether the defendant had violated Section 2(a) so the Court was not prepared to consider the plaintiff's sparse evidence of damages. As the Court said:

> The cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, however, we cannot say with assurance that respondent is a "wrongdoer." Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact

> violated § 2(a). Absent such a finding we decline to apply to this case the lenient damage rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.

Id. at 1930.

The Court noted that in *Truett Payne* "the issue [was] not so much the amount of damages as whether petitioner ha[d] in fact been injured by an antitrust violation." *Id.* at 1930 n.5. Therefore, it is reasonable to assume that the Court refused to decide the damage question for two reasons. First, under its earlier rulings discussed above, the Court had reviewed the evidence of violation in order to decide whether from such evidence, the trier of fact could reasonably have inferred the causal connection between violation and injury. And, second, the rationale for relaxation of the burden of proving impact and damages would be lost if the defendant were not a wrongdoer. The dissent took issue with the majority's statement that the burden of proof of impact should be lenient, observing that "[o]nly when this fact [impact] has been proven may a court properly be lenient in the evidence it requires to prove the amount of damages." *Id.* at 1931 (citation omitted). However, this observation appears to have been prompted by recognition of the prophylactic nature of Section 2(a). As the dissent explained: "Section 2(a) is a prophylactic statute that makes unlawful price discrimination that 'may . . . lessen competition.' Thus, a court cannot infer from the fact of a violation that defendant's behavior has caused plaintiff any injury." *Id.* The foregoing statement suggests that the Court is in agreement that a trier of fact can generally infer from the fact of a Sherman Act violation that defendant's behavior has injured plaintiff.

As stated earlier, the opinions of the court below in this and the Fourth, Fifth and Eighth Circuits referred to *supra* illustrate that the courts of appeals are con-

fused and divided on the proof of impact standard, particularly in market exclusion Sherman Act cases. The division and confusion, however, is not limited to market exclusion cases or to the aforementioned courts of appeals. The Ninth Circuit, for one, has traditionally held that from the fact of certain Sherman Act violations, proof of impact is virtually automatic. In *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 713 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960), an exclusive dealing case under Section 1 of the Sherman Act and Section 3 of the Clayton Act, that court declared that "having shown the illegal restraint applied to its product, [plaintiff] had proved the causal connection between the defendant's wrongful act and the loss of revenue." *Id.*

In *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), the court held that "[e]vidence that a merchant has been required to pay more for goods which he resells is sufficient to establish, prima facie, that he has been damaged; such proof is adequate to 'establish with reasonable probability' that profits on resale were less." 327 F.2d 459, 471. The court also noted that "where a violation adversely affects the market in which the plaintiff must buy or sell 'the mere unlawful combination over a period of time to eliminate competition is proof of damage.'" *Id.* at 471 n.31 *quoting Fox West Coast Theatres v. Paradise Theatre Bldg. Corp.*, 264 F.2d 602, 608 (9th Cir. 1958).

Again in *Knutson v. The DAILY REVIEW, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), the Ninth Circuit, citing *Story Parchment, supra*, stated that "[p]roof of the fact of damage is closely intertwined with proof of causation." Quoting *Zenith, supra*, for the rule that a plaintiff must show *some* damage, the court observed "[e]ven as to this minimal quantum of injury, the standard is relaxed; otherwise, it would defeat the loose standard applied even to the amount of damages in antitrust cases." 548 F.2d

795, 811 (citation omitted). Applying the above standard to the maximum resale price fixing conspiracy proved by the plaintiff, the court allocated the burden of proof as follows:

> Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers. This assumption merely amounts to a recognition that a "restraint" in fact restrains. The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior.

Id. at 812 (footnote omitted).

The Third Circuit expressed a similar view in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), a tie-in case involving gas station operators. There, the court stated that:

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would have obtained in a competitive regime, an individual plaintiff could prove fact of injury by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.

561 F.2d 434, 455. *Accord: State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 324 (5th Cir. 1978) (In factually simple price fixing cases " 'impact' and 'buyer' become almost synonymous"). *See also Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

The use of contradictory standards of impact proof is underscored by contrasting the decisions in *Malcolm v. Marathon Oil Co.*, *supra*, and *Wilder Enterprises, Inc. v.*

Allied Artists Pictures, supra, with those in the court below and in *Admiral Theatre Corp. v. Douglas Theatre Co., supra.*

In *Malcolm,* as in this case, the plaintiff alleged a concerted refusal to deal. Although the Fifth Circuit did not attempt to find such a violation, it assumed that one had existed and rendered its analysis of injury as if a boycott had in fact taken place. The plaintiff admitted contacting several gasoline suppliers who had refused to deal with him. However, he also admitted there were other suppliers known to him that he had not contacted. In a general discussion of impact proof, the court noted that "[i]n cases where the defendants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage, is not great. Indeed, one court has found it to be virtually nonexistent [quoting *Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp., supra*]." 642 F.2d 845, 855 n.19.

The *Malcolm* court then moved from the general to the specific. Initially, it indicated disagreement with the proposition that "a plaintiff seeking to recover damages because of an unlawful refusal to deal, must show a lack of an alternative supply." *Id.* at 863. Nevertheless, the plaintiff must attempt to mitigate his damages by trying to locate alternative suppliers. Failure to try or, alternatively, success in locating such suppliers does not negate impact, it simply minimizes the amount of the plaintiff's damages.

> [Plaintiff] may still be injured if he would have been better off without the refusal, but the amount of damage would be reduced . . . . [*T*]*he "burden of showing that the victim of tortious conduct failed to minimize his damages rests with the wrongdoer."* . . . The defendants did no more than establish that Malcolm failed to contact a few known suppliers of gasoline. They did not establish that those dealers could or

> would have sold Malcolm the needed product in sufficient quantities to keep his business alive . . . .

Id. (emphasis added).

The court concluded its discussion by declaring that if the burden were on plaintiff to disprove the existence of alternative suppliers, that burden would be so rigorous as to impede recovery.

> Requiring an antitrust plaintiff to prove such a negative as a lack of alternative supply places too great an obstacle in the way of antitrust recovery. The greatest burden that reasonably could be placed on him would be the burden to show the reasonableness of his mitigation efforts. And even if Malcolm had that burden . . . he had met [it] . . . . This proof consisted of Malcolm's testimony that his numerous calls to gasoline suppliers failed to secure him any gasoline.

Id.

The court below in this case, on the other hand, declined to review the evidence proffered by the petitioner as to the nature, intent, and probable consequences of the concerted refusal to deal. Moreover, it is fair to say the court refused to assume the truth of the petitioner's allegations concerning the violation. Rather, the court narrowly focused on the evidence of damages; specifically the evidence of the petitioner's failure to contact known suppliers after several suppliers had refused to deal with him. Without requiring the respondent to proffer any substantiating evidence that the known suppliers whom petitioner failed to contact "could or would have sold [the petitioner] the needed product in sufficient quantities . . ." (*Malcolm, supra*) during the period when several suppliers refused to deal with him, the court of appeals concluded that the petitioner had failed to meet his burden of proving impact. Thus, as distinguished from *Malcolm*, the court foisted on petitioner the entire burden of *disproving* the availability of alternative supplies. More than that, in finding no injury, the court

never considered evidence of both the tendency of the violation to injure the petitioner's business and the decline in the petitioner's profits and values.

In *Wilder Enterprises, Inc. v. Allied Artists Pictures, supra,* the Fourth Circuit reviewed a lower court's directed verdict against a motion picture exhibitor who claimed he had been deprived of the ability to acquire first-run films by a conspiracy among motion picture distributors and exhibitors pursuant to which they "split" first run films between the conspiring exhibitors.

The lower court had said that the plaintiff relied on two theories to prove the fact of injury: (1) demand prerequisite theory and (2) comparative theater or futility theory. With respect to the first theory, the lower court ruled that:

> Even if this evidence [of preferential] treatment were presented, there can be no conclusion drawn unless plaintiff can show it requested and was denied similar treatment. [*Citing Admiral Theatre Corp., supra.*]
>
> * * * *
>
> As a prerequisite to this approach . . ., plaintiff must show it bid or attempted to negotiate to get each film it claims it did not receive due to defendants' unlawful action and that it was unjustifiably denied those films.

1978-2 Trade Cases ¶ 62,886 at 79,131.

Regarding the futility theory, the lower court observed that "the records show . . . that during the critical years when plaintiff was developing a feeling of futility, a large percentage of the films it played was licensed from distributor defendants." *Id.* at 79,132. The lower court also noted that there was no evidence, other than the plaintiff's testimony, from which the jury could determine that the films he received were inferior to those awarded the conspiring exhibitors. *Id.* Accordingly, the court directed a verdict for lack of any proof of injury.

In reversing and remanding the district court decision in *Wilder*, the Fourth Circuit focused its attention upon the evidence of violation. It found evidence that independent exhibitors had been denied access to the split; one such exhibitor had even begged to be allowed to participate in the split; and the plaintiff's owner had testified he could not get first-run films the way the system had operated. From this evidence of the violation and its probable consequences, the court stated that the jury could infer that Wilder's bidding would have been futile. 632 F.2d 1135, 1142-1143. The court also had little difficulty finding that injury could have been inferred from the split. The court stated: "Most first-run films were licensed as split. Independent exhibitors were excluded from the split and denied access to many of these films. After the split started in 1971, Wilder had difficulty obtaining these films, its profits decreased, and eventually its theaters closed." *Id.* at 1142.

The *Admiral Theatre* case bore a close factual similarity to *Wilder*. Yet the Eighth Circuit refused to consider the natural tendency of the split to injure the plaintiffs. The court acknowledged that the failure of the plaintiffs to receive first-run films may constitute a part of the fact of injury. Nevertheless, the court insisted upon plaintiffs showing evidence (which did not exist) that they attempted to secure each picture they had not received and that their failure to obtain it was attributable to the split. The court explained its reasoning as follows: "One cannot show 'fact of injury' by alleging he did not receive something when he initially never tried to obtain it. Thus, the 'demand prerequisite' is also inherently necessary in showing damages, plus the causal connection of those damages to the split activities." 585 F.2d at 893-94 (citations omitted). As was true in the case below, the *Admiral Theatre* court,

in determining impact, imposed the additional burden on the plaintiffs of showing that for each product they had not received, they had made a demand, the demand was rejected, and it was rejected due to the claimed antitrust violation.

The impact standard used by the court below and the Eighth Circuit is unduly rigorous by comparison to the standard articulated by the Court and used in at least the Third, Fourth, Fifth and Ninth Circuits. Such a rigorous standard ignores, indeed reverses, "[t]he constant tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done." *Bigelow v. RKO Radio Pictures, Inc., supra* at 265.

The Court should grant the petition for a writ of certiorari to resolve the conflict among the courts of appeal and clarify the law on a significant question going to the heart of effective private antitrust enforcement.

2. In *J. Truett Payne Co., Inc. v. Chrysler Motors Corp., supra*, the Court purposefully abstained from making a determination of the sufficiency of plaintiff's evidence of impact and damages. The stated reason for this abstention was the failure of the lower court to make a finding of violation, thereby preventing the Court from applying the "traditional rule excusing plaintiffs from an unduly rigorous standard of proving antitrust injury," 451 U.S. 557, 101 S.Ct. 1923, 1929, when a violation has been proved. Unstated, but implicit in both the majority and dissenting opinions, is the recognition that proof of violation is an absolute prerequisite to determining impact. The nature of such proof alone makes possible a determination whether (a) the defendants' acts tended to injure plaintiff and (b) evidence of plaintiff's decline in prices, profits or values could reasonably be attributed to such acts. This is the tradi-

tional rule for demonstrating impact. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra; Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co., supra.*

In this case, the court below bypassed the issue of violation declaring it to be unnecessary to its analysis of impact. On the same day the court rendered its initial opinion herein, it also bypassed the violation issue in another decision in which it held the plaintiff had not proved fact of injury. *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir. 1982). The court of appeals' practice of bypassing the issue of violation and turning immediately to the question of injury is at odds with the clear command of the Court in *Truett Payne* and the rationale behind the command. In every modern antitrust case decided by the Court in which the question of injury and damage has come into play, the review has begun with an analysis of the evidence of violation. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra; Continental Ore Co. v. Union Carbide & Carbon Corp., supra; Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co., supra.* The overwhelming majority of courts of appeals have followed the same practice. *See, e.g., Malcolm v. Marathon Oil Co., supra; Wilder Enterprises, Inc. v. Allied Artists Pictures, supra; Richfield Oil Corp. v. Karseal Corp, supra.* Some courts have listed in order of priority of proof the elements of a private antitrust action: (1) violation, (2) impact, and (3) amount of damages. *See Windham v. American Brands, Inc., supra,* and *State of Alabama v. Blue Bird Body Co., Inc., supra.* The listing of these elements might suggest that each one must be addressed in isolation, and the absence of any one is fatal to the plaintiff's case. Unless the elements are analyzed in exact order of their priority, however, this approach is bound to deprive the plaintiff of the benefit

of all his proof and the reasonable inferences which flow from such proof. The soundness of following these priorities lies in the certainty that until the evidence of violation has been sifted, it is impossible to fully appreciate its effects upon competition and also competitors, suppliers or customers. This was the general implication of *Blue Shield of Virginia v. Carol McCready*, —— U.S. ——, 102 S.Ct. 2540 (1982), where the Court addressed a group boycott which, though directed at excluding psychologists from the market, also injured Blue Shield subscribers.

The congressional objective in enacting the antitrust laws was to promote and preserve a free marketplace consisting of many competitive units, leading inevitably to lower prices, increased quality and better service. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958). A concerted refusal to deal with customers and potential competitors, if permitted to persist, is calculated to destroy these national objectives. Competition on the basis of price and service is stifled, even if a few members of the combination surreptitiously break ranks. For that reason, boycotted customers are perforce deprived of the benefits of open competition.

In setting adrift the fact of violation in this case, it was impossible for the court below to gain any appreciation whatsoever as to whether the violation had a tendency to injure the petitioner and competition generally.[10]

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[10] The district court instructed the jury that this case was governed by the rule of reason and that in order to render a verdict for petitioner, the jury must find that the alleged violation suppressed competition and also injured petitioner. (T.R. 3284, 3288-3289) Although the district court did not give a *per se* instruction, the cases hold that when a market exclusion policy is implemented as part of a price fixing scheme, it is governed by the *per se* rule which conclusively presumes injury to competition. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

In a market characterized by open competition, as opposed to collusion, would delivery times have been reduced? Would wider assortments and larger quantities of products have been available? Would one-stop service at closer locations have been available? These are questions, the answers to which can only be found by addressing the fact of violation. And, without answers to these questions a determination of injury or its absence is purely guesswork.

To be certain, avoidance of the question of violation saves time, but this saving is at great expense to the antitrust plaintiff and to private enforcement of the antitrust laws. As the Court said in *Blue Shield of Virginia v. Carol McReady, supra*: "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'" —— U.S. ——, 102 S.Ct. at 2549 (citations omitted).

The writ of certiorari should be granted to examine a radical departure from the sound rules announced by the court for determining injury in Sherman Act cases.

3. In *Glasser v. United States*, 315 U.S. 60 (1942), the Court laid down the general rule that on appeal from a judgment based upon a jury verdict both verdict and judgment will be sustained when they are supported by substantial evidence in the record. In *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, the Court reiterated that the authority of an appellate court when reviewing the findings of a jury "is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S. 100, 123.

It is axiomatic in the law of civil procedure that the reviewing court must view the record and reasonable inferences to be drawn from it in the light most favorable to the non-moving party. *Galloway v. United States*,

319 U.S. 372 (1943). This applies to review of a favorable judgment as in this case although it also applies to the granting of a directed verdict, judgment notwithstanding the verdict or summary judgment. In this connection, the plaintiff in an antitrust suit must be given the benefit of all his proof. Thus, the reviewing court must "look at the whole picture and not merely at the individual figures in it." *Continental Ore Co. v. Union Carbide & Carbon Corp., supra* at 699. The portion of the evidence a court is to consider is not settled. Some courts of appeals have held that the prevailing party is entitled to rely upon evidence most favorable to its position. *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967); *Richfield Oil Corp. v. Karseal Corp., supra.* However, other circuits have different practices. *See generally* the discussion of the conflict among the circuits on this issue in the Honorable Justice White's dissent to the denial of a writ of certiorari in *Schwimmer v. Sony Corp. of America*, —— U.S. ——, 103 S.Ct. ——, 1089 ATRR 906 (Nov. 8, 1982).

With respect to proof of injury in antitrust cases, the Court has admonished lower courts to "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123.

The court below in this case gave no credit to the ample evidence of an organized boycott of unauthorized dealers (including petitioner) by authorized dealers and the respondent; to the petitioner's testimony that those few authorized dealers who had breached the boycott did not carry sufficient stock in respondent's equipment to fulfill the demand of petitioner's customers; and to testimony that petitioner had suffered delays in obtaining

such equipment from them, particularly with regard to replacement parts. Finally no credit was given to circumstantial evidence from which the jury could reasonably have inferred that the petitioner's decreased sales of serial-numbered equipment were due, at least in material part, to the respondent's practice of tracing back to the originating dealer serial numbers on equipment sold to unauthorized dealers. Significantly, the court did not even consider the petitioner's substantial evidence of declining sales and profits from the sale of respondent's equipment after the boycott had become effective. By contrast, the court fully credited the bare, uncorroborated deposition statements of some authorized dealers who said they would have sold equipment to the petitioner if he had called them. Yet there was no evidence of record that they could or would have filled the petitioner's orders during the period when several dealers had refused to sell to him. Nor was there any evidence that the petitioner's declining sales and profits were attributable entirely to causes unrelated to the boycott.

Thus, it is evident that the court of appeals attached greater weight to the testimony of a few dealers who themselves were ostensibly members of the conspiracy than it did to petitioner's evidence. Moreover, the court ignored the teaching of the Court that where the defendant's wrongful acts have a tendency to injure plaintiff's business and there has been a decline in prices, profits or values not attributable to other causes, the trier of fact is entitled to infer the fact of injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra* at 123; *Bigelow v. RKO Radio Pictures, Inc.*, *supra* at 264. The jury made this inference.

The Court should grant certiorari in this case to resolve a basic question concerning the proper method of weighing the sufficiency of evidence in antitrust cases and more specifically in market exclusion cases in which the question of fact of injury has been raised.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the opinions and judgment of the court of appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7488

CLIFTON M. McCLURE,
Plaintiff-Appellee,

v.

UNDERSEA INDUSTRIES, INC., a corporation d/b/a SCUBAPRO AND JOHNSON DIVERSIFIED, INC., a corporation,
Defendant-Appellant.

March 29, 1982

Appeal from the United States District Court
for the Northern District of Alabama

Before MORGAN, KRAVITCH and HENDERSON, Circuit Judges.

HENDERSON, Circuit Judge:

Undersea Industries, Inc. (USI), appeals from an adverse jury verdict in an antitrust action initiated by the appellee, Clifton M. McClure. We conclude that the briefs and the record do not support the claim that McClure was injured as a result of the alleged boycott conspiracy, and, thus, we reverse.

The appellee, Clifton McClure, is a retail distributor of scuba diving equipment. He owns and operates a professional dive shop in Huntsville, Alabama, under the name of Aquaspace. He is assisted in this effort by his wife, Bobbie McClure. The appellant, USI, is a manufacturer of diving equipment marketed under the name, Scubapro. Those selected as dealers are authorized to sell, repair and service Scubapro products. McClure's applica-

tion for Scubapro authorization was granted in 1968 and he began to buy equipment directly from the USI California factory. For the next several years, McClure made substantial purchases from USI. It was not until 1976 and 1977 that he decreased his procurement of diving apparatus from the appellant.

In 1975, McClure became involved in developing a new diving equipment manufacturing company called Sub Aquatic Systems (SAS). He carried both SAS and Scubapro products in his Huntsville store. In 1976 and 1977, the relationship between McClure and USI deteriorated and in June, 1977, USI management terminated McClure as an authorized dealer of Scubapro products. This cancellation meant that McClure could no longer purchase equipment directly from the Scubapro factory nor could he offer to his customers the full benefits of USI's warranty program. Under this warranty system, any repair work performed by an unauthorized dealer voided the warranty to the consumer and consequently, customers who purchased from unauthorized dealers were, at times, referred by the company to authorized dealer for service. Also, it was more difficult for an unauthorized dealer to secure spare parts or manufacturer's manuals on repair.

Soon after McClure received word of his termination, he made arrangements to purchase Scubapro equipment from two authorized dealers. Over the next few months, he purchased equipment from several dealer sources and had offers from other dealers to sell him any Scubapro equipment he required. However, in December 1977 and January, 1978, the appellee did contact several authorized dealers who refused to sell to him. Then, on February 2, 1978, McClure filed this lawsuit against USI.[1]

The complaint principally charged: (1) that USI terminated McClure's dealership as part of a conspiracy to

[1] The original complaint also named USI's parent corporation as a defendant, but the action against the parent was dismissed on July 28, 1978.

restrain trade, prevent competition and monopolize the scuba equipment industry, 15 U.S.C. §§ 1, 2; (2) that USI engaged in a conspiracy to restrain trade by fixing prices and maintaining illegal territorial policies, 15 U.S.C. § 1; and (3) that the appellant and certain authorized dealers conspired to boycott McClure by refusing to sell him Scubapro equipment after his termination, 15 U.S.C. § 1. Record at 2. The case came on for trial and, after the close of the plaintiff's evidence, the district court granted USI's motion for a directed verdict on the monopolization and price fixing causes of action. Trial Transcript at 2535-7 (hereinafter cited as T.R.). The defendant's motion for a directed verdict on the boycott conspiracy charged was overruled, and the trial proceeded on this claim only. After the close of all the evidence, the court denied USI's renewed motion for a directed verdict. The jury returned a verdict in favor of McClure for $20,000.00 single damages, and the court awarded attorney's fees of $85,000.00. Thus, judgment was entered against USI in the total amount of $145,000.00. USI's motion for a judgment notwithstanding the verdict or a new trial was denied, and USI subsequently lodged this appeal.

McClure alleges that USI violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by entering into a post-termination conspiracy to boycott his purchase of Scubapro equipment. However, "before a Sherman Act violation becomes cognizable as a private civil remedy," liability must be established under § 4 of the Clayton Act, 15 U.S.C. § 15. *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 317 (5th Cir. 1978). Section 4 of the Clayton Act provides that a private party "who shall be injured in his business or property" due to an antitrust violation may recover treble damages plus costs and attorney's fees. 15 U.S.C. § 15. Hence, "[p]roof of a violation of the Sherman Act standing alone does not establish civil liability . . . ." *Blue Bird*, 573 F.2d at 317. Under § 4 of the Clayton Act, a private litigant must prove, in

addition to an antitrust violation, "an injury to his business resulting from the defendant's wrongful actions," or the "fact of damage," and "some indication of the amount of damage done." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129, 143 n.9 (1969). The term "fact of damage" refers to causation and simply means "that the antitrust violation caused injury to the antitrust plaintiff." *Blue Bird*, 573 F.2d at 317. The "fact of damage" is a sufficiency of the evidence question and cannot be based on mere speculation. *Blue Bird*, 573 F.2d at 317; *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 509 F.2d 147, 152 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975). Although the defendant's illegal conduct need not be the sole cause of any alleged injury, the plaintiff must prove, "as a matter of fact and with a fair degree of certainty, that the defendant's illegal conduct materially contributed to the injury." *Terrell*, 494 F.2d at 20. *See Blue Bird*, 573 F.2d at 317.

As the Fifth Circuit Court of Appeals stated in *Shumate & Co., Inc.*, 509 F.2d at 152, "injury is the *sine qua non* for stating a cause of action" based on an antitrust conspiracy. Accordingly, we must initially determine if the evidence supports the claim that McClure's business suffered injury as a result of the purported boycott conspiracy. Before reaching this issue, attention should be directed to the exact posture of the case as it is before our court. As pointed out above, the district court directed a verdict on the claims of attempted monopolization and price fixing. The judge stated:

> Therefore, the Court concludes that the claim of attempted monopolization fails under the evidence presented by the plaintiff, and that the defendant is entitled to a directed verdict of that claim advanced in Count II of the complaint.

> With respect to the claim that defendant terminated the plaintiff as an authorized Scubapro dealer as part of a conspiracy to restrain trade, the Court is of the opinion that that claim is not supported by the credible evidence in the case. More particularly, the Court is impressed that if there were any evidence to support an inference that the defendant was guilty of a conspiracy to fix prices, there is a complete absence of any evidence that the plaintiff was injured in his business thereby.
>
> Therefore, the Court holds that the defendant is entitled to a directed verdict with respect to the claim advanced in Count I of the complaint.

T.R. at 2535-6. Therefore, this appeal does not involve the legality or illegality of McClure's termination or any injury resulting from that termination. The only dispute on appeal is the evidentiary support for the existence of a boycott conspiracy after the termination was effected and the damages flowing from this post-termination boycott conspiracy.[2] The trial judge stated the issue in his charge to the jury as follows:

> Specifically, the plaintiff claims that the defendant, U.S.I., entered into a combination or conspiracy in restraint of trade with various dealers of Scubapro equipment; in other words, its own dealers, and that such combination or conspiracy had the effect of boycotting the plaintiff, Mr. McClure, by precluding the plaintiff from purchasing Scubapro equipment from other dealers, thereby unreasonably restraining interstate trade and commerce within the sport diving industry.

T.R. at 3277.

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[2] Both parties agreed, either in their briefs or at oral argument, that the conspiracy alleged is the post-termination conduct to boycott McClure's purchase of Scubapro equipment.

> If you find that plaintiff has met its burden of proof and established every required element of the claimed or alleged violation, there remains a final element which plaintiff must prove before Defendant U.S.I. may be held liable for any of the charges plaintiff has made. You must also be satisfied by a preponderance of the evidence that the alleged conspiracy was material in causing concrete and determinable injury to plaintiff's business. Plaintiff must also provide some indication of the amount of damage already done.

T.R. at 3288.

In his brief, McClure evidences a misunderstanding of the damages issue. He argues that his business was damaged because the Scubapro franchise was cancelled and emphasizes the loss of sales growing out of this termination. However, the termination issue was disposed of by directed verdict in the district court,[3] and injury from the termination is irrelevant on this appeal. Again, we are only concerned with damages resulting from an alleged conspiracy to preclude McClure's purchase of Scubapro products after the cancellation of his authorization.

Even if McClure was in fact prevented from buying Scubapro equipment from certain authorized dealers, the record fails to support a reasonable inference that he was injured thereby. Soon after his termination in June, 1977, McClure had made arrangements with two authorized dealers, Bill Hardy of San Diego, California, and Mike Maynard of Little Rock, Arkansas, to buy equipment at dealer cost. T.R. at 667-74, 1311, 2525, defendant's exhibits 45-47. In the ensuing months, he also purchased equipment at dealer cost from two other authorized dealers—Kim Stalvey in Nashville, Tennessee, and Donnie Reece in Fort Worth, Texas. McClure's supply was uninterrupted. T.R. 671, 1301-02, 1310-12, 2260. These

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[3] The appellee does not appeal the trial judge's order granting a directed verdict for USI on the first two claims.

dealers placed no limits on the amount of equipment McClure could purchase and sold at dealer cost, the price McClure had paid to the USI factory. T.R. 1311-12, 2260-61, 2525, defendant's exhibit 45. In fact, McClure procured more from these dealers in the latter half of 1977 than he had purchased from the factory in the first four months of that year. Defendant's exhibits 46-47, plaintiff's exhibit 2. Although he purchased from the factory on a COD basis, after the termination some dealers sold him equipment on credit or by other financial arrangements of his choice. T.R. 673, 1235-36, 2260-61, defendant's exhibit 46. Appellee submits no evidence to show that the shipments from the dealers took longer than from the factory. In fact, shipments from Bill Hardy in San Diego required about the same length of time as did shipments from the USI factory. T.R. 1311, 1236-37, defendant's exhibit 82. While stating that they could not buy all they wanted from the existing dealer sources, McClure and his wife admitted that several other dealers had offered to sell them additional Scubapro products. Nonetheless, these additional offers were never pursued by the McClures. T.R. 668-70, 1312-13, 1344, 2161-63, 2446, 3120. Thus, McClure was able to purchase Scubapro equipment after the termination on very favorable terms. He was not injured by the refusal of the few alleged boycotting dealers to sell equipment. They could offer him nothing more than the selling dealers were already providing.

The appellee strenuously asserts that he did suffer greatly in his business by reason of losing access to Scubapro's very good warranty program. He attempts to show that sales and profits were lost as a result of his inability to offer warranty service or repair. Even if these contentions are true, which are strongly contested by the appellant,[4] they are not pertinent to the precise issue on

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[4] One dealer-supplier, Mike Maynard, testified that he filled out the warranty cards for McClure and sent them to the USI factory

appeal. Injury due to a company-promulgated warranty policy is not related to damage from a conspiracy to boycott McClure's Scubapro purchases. The denial of warranty access, if indeed it did occur, was dictated by a restrictive company policy and was effectuated by the termination of McClure's Scubapro authorization. A challenge to the policy itself or the cancellation of the dealership is the proper method to reach this issue. A decision between certain authorized dealers and the company to boycott McClure's purchases has nothing to do with the denial of warranty services. The alleged boycotting dealers could not offer McClure any individual warranty protection. If, in fact, they had all sold products to McClure, his situation with respect to the warranty would have been no different. Only a change in company policy or a re-authorization of McClure as a Scubapro dealer could have reversed or prevented the injury. There is a complete absence of evidence, other than McClure's and his wife's own allegations, to infer injury specifically from the alleged boycotting dealers' refusal to sell. There is no evidence showing the fact or the amount of damage from his inability to procure certain products or from inconveniences in the shipping or credit arrangements available to McClure after the termination. Accordingly, since the evidence fails to support a reasonable inference of injury, the jury verdict must be reversed. *See Fairley v. American Hoist & Derrick Co.*, 640 F.2d 679, 681 (5th Cir. 1981); *Shumate & Co.*, 509 F.2d at 153-55. In view of this conclusion, there is no need to review the appellant's other assignments of error.

The judgment of the district court denying the appellant's motion for judgment notwithstanding the verdict is

REVERSED.

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in his, Maynard's, own name. T.R. 2527-28. Also, Dick Bonin, the president of USI, testified that unauthorized dealers may repair the Scubapro regulators without jeopardizing the warranty. T.R. at 3060-65.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7488

CLIFTON M. MCCLURE,
Plaintiff-Appellee,

v.

UNDERSEA INDUSTRIES, INC., a corporation d/b/a SCUBAPRO AND JOHNSON DIVERSIFIED, INC., a corporation,
Defendant-Appellant.

Sept. 17, 1982

Appeal from the United States District Court
for the Northern District of Alabama

Before MORGAN, KRAVITCH and HENDERSON, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

Our original opinion in this case appears at 671 F.2d 1287 (11th Cir. 1982). There, we reversed a jury verdict in favor of the plaintiff-appellee, Clifton M. McClure. On petition for rehearing, we have carefully considered each of the arguments raised by McClure and adhere to our original opinion, with the following clarification.

We reiterate that a private antitrust plaintiff *must* prove injury caused by an antitrust violation in order to recover treble damages under § 4 of the Clayton Act 15 U.S.C. § 15. This requirement is written into the very

language of § 4, which expressly limits the individual treble damage remedy to those private plaintiffs who suffer injury to business or property "by reason of" an antitrust violation. *Id.* After a search of the record in this case, we find no evidence at all which discloses that McClure was injured by an alleged post-termination boycott conspiracy. McClure's claims of price fixing, monopolization, and illegal termination as an authorized Scubapro dealer are not before us. The only issue here is McClure's charge that he was prevented from purchasing USI equipment after his termination as a result of a boycott conspiracy. The record clearly shows that McClure could and did in fact purchase Scubapro equipment after his termination at very favorable terms. Thus, the prerequisite causal connection between any alleged violation and injury is absent. McClure's assertions of injury all relate to the termination of his franchise, not to the post-termination boycott conspiracy. As emphasized in our original opinion, the distinction between the damage claims for these two separate causes of action is crucial to an understanding of the decision. *See* 671 F.2d at 1290-91.

Since we find no evidence of any injury resulting from the alleged boycott, and since the causal connection mandated by § 4 is non-existent, we do not feel that *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1982), requires a ruling on the substantive violation. It is obvious to us that even assuming the existence of an alleged boycott conspiracy, it was totally ineffective because there was no injury to McClure. Under these circumstances, a substantive ruling would serve no useful purpose. *See Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir. 1982) (post-*Payne* case affirming summary judgment for antitrust defendant because, assuming a violation existed, plaintiff had not proved that he suffered any injury as a result thereof). In *Payne*, the appellate court found no

substantial evidence of injury to the plaintiff—here, we find no evidence at all. Also, the question in *Payne* was the "appropriate measure of damages" in a private treble damage suit based on the Robinson-Patman Act, 15 U.S.C. § 13(a). *Payne*, 451 U.S. at 559, 101 S.Ct. at 1925, 68 L.Ed.2d at 446. In *McClure*, the question was not the measure of damages, but proof of the essential element of a private treble damage suit—the causation of injury in fact. *Cf. Jot-Em-Down Store (JEDS), Inc. v. Cotter & Co.*, 651 F.2d 245 (5th Cir. 1981) (appellate court remanded for a substantive ruling because district judge directed a verdict without stating any reasons).

For the foregoing reasons, the petition for rehearing is DENIED. No member of this panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Fed. R.App.P.; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. 78-L-5021-NE

CLIFTON M. MCCLURE,
Plaintiff

vs.

UNDERSEA INDUSTRIES, INC.,
a corporation doing business as SCUBAPRO,
Defendant

[Filed May 30, 1980]

ORDER

This cause, coming on to be heard, was submitted upon the motion filed in behalf of defendant for a judgment notwithstanding the verdict of the jury, or in the alternative, for a new trial, filed herein on the 28 day of February, 1980. By stipulation of counsel, such motion is deemed to have been refiled upon the date of the entry of final judgment herein. Upon consideration of such motion and the excellent brief in support thereof, the Court is of the opinion that such motion is due to be denied.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that such motion be and the same is hereby overruled and denied.

DONE this 29th day of May, 1980.

/s/ Seybourn H. Lynne
Senior Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. 78-L-5021-NE

CLIFTON M. McCLURE,
Plaintiff

vs.

UNDERSEA INDUSTRIES, INC.,
a corporation doing business as SCUBAPRO,
Defendant

[Filed May 30, 1980]

JUDGMENT

On the 22nd day of February, 1980, the jury having returned a verdict in favor of the plaintiff, Clifton M. McClure, against the defendant, Undersea Industries, Inc., in the amount of $20,000, pursuant to the provisions of 15 U.S.C. § 15, such amount is trebled to arrive at the sum of $60,000.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that plaintiff, Clifton M. McClure, have and recover of defendant, Undersea Industries, Inc., the sum of SIXTY THOUSAND DOLLARS, together with a reasonable attorney's fee in the amount of EIGHTY-FIVE THOUSAND DOLLARS, or a total of ONE HUNDRED FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($145,000), together with the costs of court incurred herein.

It is further ORDERED by the Court that payment of the proceeds of the judgment, attorney's fee and costs herein shall be made directly to the attorney of record

for plaintiff, and upon receipt thereof, such attorney will satisfy the said judgment on the records of this Court.

DONE this 29th day of May, 1980.

/s/ Seybourn H. Lynne
Senior Judge

APPENDIX E

STATEMENT OF MUTUAL AGREEMENT

Between

SCUBAPRO

and

AUTHORIZED SCUBAPRO DEALER

SCUBAPRO Franchise

Scubapro products are recognized as the criterion of quality in diving equipment. As such, they are distributed exclusively through selected, specialized dealers. A Franchise is awarded to those selected dealers signifying their status as an Authorized Scubapro Dealer. The foundation of this franchise is an acknowledgement of responsibilities. Scubapro and the Dealer acknowledge certain mutual commercial responsibilities. Diving and diving equipment involve the safety of the individual, therefore, Scubapro and the Dealer further acknowledge responsibilities to the consumer. The continuation of this Franchise is contingent upon the proper performance of these responsibilities by the Dealer and Scubapro.

Responsibilities of SCUBAPRO

To use discretion in the selection of Dealer.

To select only serious retailers that have the facilities necessary to provide adequate service to the consumer. These services include diving instruction, equipment repair and air refills.

To select only experienced Dealers that have the background and the experienced personnel to assist the customer in the selection of safe, proficient equipment.

To select only Dealers that have a professional attitude and a reputation for ethical business conduct.

To provide any authorized Dealer with the names of other Scubapro Dealers so that all concerned may know with whom they are working.

To prevent over-distribution of Scubapro products through a selective program of dealerships.

To provide adequate information to authorized Dealers on policies, programs, products and product changes.

To stand behind all factory warranties, guarantees and product quality standards.

To drop any dealer who adversely effects the reputation of Scubapro or its other dealers.

To drop any dealer who indiscriminately cuts prices or who supplies Scubapro products to any unauthorized store.

Responsibilities of the Dealer

To ensure that buyers of Scubapro equipment such as regulators, tanks, Automatic Decompression Computers and other safety equipment have had or will receive proper diving instruction.

Not to sell Scubapro regulators, tanks and other safety equipment by mail.

To provide consumers with repair and maintenance service in keeping with the high quality of Scubapro products.

To cooperate with Scubapro within the framework of its warranties and guarantees.

To cooperate with all Scubapro's legal policies and programs.

To place the recommendation and prestige of the store behind the Scubapro product line.

To give proportionate representation to the complete Scubapro line in stocking and inventory.

To pay Scubapro invoices according to terms.

Not to sell, trade or transfer Scubapro products to any store other than another authorized Scubapro Dealer except when permission is given by Scubapro in advance.

Not to advertise Scubapro products at less than recommended list prices.

To sell Scubapro at the prices suggested in the Scubapro Catalog and Price List.

To cooperate with price programs avoiding special sales unless receiving authorization from Scubapro.

To give no special discounts, except in rare individual cases where sound judgment indicates a valid promotional purpose is served.

Validity

This franchise is effective when signed by the Dealer and an authorized representative of Scubapro.

This franchise becomes invalid with any change of ownership or change of management of the dealer and may not be assigned or transferred to another dealer or management without the consent of Scubapro.

After the effective date of this franchise any subsequent branches opened by the dealer must be approved by Scubapro before they sell or display Scubapro products.

This franchise does not convey, grant or imply any exclusive territorial rights. Scubapro reserves the right to appoint additional dealers where in the judgment of Scubapro a valid reason exists.

This Franchise Agreement can be terminated by either written notice or verbally by the principal officer of the Dealer or Scubapro when the opposite party is decidedly in default in their aforementioned responsibilities.

Signed for SCUBAPRO

Signed for DEALER

Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1017

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CLIFTON M. McCLURE, *Petitioner*,

v.

UNDER SEA INDUSTRIES, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR UNDER SEA INDUSTRIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Under Section 4 of the Clayton Act, 15 U.S.C. § 15, a private antitrust plaintiff must prove injury to its business or property caused by an alleged antitrust violation in order to recover treble damages. Accordingly, the only question now presented is:

Whether the court of appeals correctly determined, as a factual matter and based upon a careful review of the voluminous record, that "the evidence fails to support a reasonable inference of injury" to petitioner resulting from a claimed dealer boycott conspiracy where petitioner admitted that at least eight dealers either sold or offered to sell him product at dealer cost?

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IN THE

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UNDER SEA INDUSTRIES, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR UNDER SEA INDUSTRIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-8a) is reported at 671 F.2d 1287. The *per curiam* opinion of the court of appeals denying rehearing and rehearing en banc (Pet. App. B, 9a-11a) is reported at 685 F.2d 1309.

STATEMENT

This case involves an alleged boycott conspiracy to prevent petitioner McClure, a diving equipment retailer, from purchasing Scubapro brand products from other retail dealers. At trial, however, McClure and his witnesses admitted that four dealers actually sold Scubapro equipment to McClure at dealer cost and that at least four other dealers affirmatively offered to sell McClure any additional equipment he might require. On this basis, the Eleventh Circuit found that there

was insufficient evidence of any injury to McClure and that, in the absence of this essential statutory element, McClure's claim for antitrust treble damages must fail.

1. Factual Background

Respondent Under Sea Industries, Inc. ("USI") is a manufacturer of diving equipment marketed under the name, Scubapro. Petitioner McClure is a retail distributor of scuba diving equipment and, together with his wife, operates a dive shop in Huntsville, Alabama. For a number of years, McClure was authorized by USI to sell, repair and service Scubapro products. USI, however, terminated McClure's Scubapro authorization in June, 1977 after two years of decreasing equipment purchases and a deteriorating relationship. (Pet. App. A, 1a-2a.)

Immediately after his termination, McClure made arrangements with two authorized Scubapro dealers to buy Scubapro equipment at dealer cost. McClure also began purchasing equipment at dealer cost from two additional dealers in the ensuing months. McClure's supply of Scubapro equipment was uninterrupted and none of his four dealer suppliers placed any limits on the amount of equipment he could buy. McClure was able to purchase Scubapro product at dealer cost, the same price he had previously paid to USI, and shipments from the most distant dealer-supplier required about the same length of time as did shipments from the USI factory. Although McClure had purchased from USI on a C.O.D. basis, he was able to purchase equipment from his dealer sources on credit or by other financial arrangments of his choice. (Pet. App. A, 6a-7a.)

Besides the four dealers who were systematically supplying Scubapro equipment to McClure after his termination as an authorized dealer, McClure and his wife also admitted that several other dealers had expressly offered to sell them additional Scubapro products. These additional offers, however, were never pursued. (Pet. App. A, 7a.)

Thus, from the time he first received word of his termination, McClure purchased Scubapro equipment from several dealers and had offers from still other dealers to sell him any such equipment he might require. Despite his readily available actual and potential sources of supply, McClure telephoned a few additional dealers during December, 1977, and January, 1978, who purportedly declined his solicitations. Immediately thereafter, on February 2, 1978, McClure filed this lawsuit against USI. (Pet. App. A, 2a.)

2. Proceedings Below

McClure's complaint charged: (1) that USI terminated his Scubapro authorization as part of a conspiracy to restrain trade and monopolize the scuba equipment industry; (2) that USI engaged in illegal resale price maintenance and territorial allocations; and (3) that USI organized a dealer boycott to preclude McClure from purchasing Scubapro equipment from other authorized dealers after his termination. The case came on for trial and, after the close of McClure's evidence, the district court directed a verdict in USI's favor on the first two causes of action.[1] USI's motion for a directed verdict on the post-termination dealer boycott claim, however, was denied and the trial proceeded on this issue alone. (Pet. App. A, 2a-3a.)

Altogether, trial in the district court lasted three weeks and generated an evidentiary record of more than 3,000 pages of trial transcript and several file drawers of exhibits. After USI's renewed motion for a directed verdict at the close of all the evidence was denied, the jury returned a verdict for $20,000 single damages. The trial judge subsequently entered judgment for treble that amount plus costs and an attorney's fee and, following denial of its motion for a judgment notwithstanding the verdict or a new trial, USI appealed. (Pet. App. A., 3a.)

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[1] McClure did not appeal the district court's directed verdict on the issues of illegal termination and resale pricing/territorial practices. (Pet. App. A, 4a-6a & n.3; Pet. App. B, 10a.)

On appeal, the Eleventh Circuit undertook a detailed analysis of the factual record concerning McClure's claims of injury resulting from the alleged post-termination dealer boycott. Even assuming McClure had been prevented from buying Scubapro equipment from certain authorized dealers,[2] the court of appeals nonetheless concluded that "the record fails to support a reasonable inference that he was injured thereby" (Pet. App. A, 6a). In particular, the court of appeals reviewed the extensive evidence, including numerous admissions by both McClure and his wife, establishing that McClure was able to purchase unlimited quantities of Scubapro products at dealer cost from his numerous dealer-suppliers (*id.* at 6a-7a). As the court of appeals concluded:

> Thus, McClure was able to purchase Scubapro equipment after the termination on very favorable terms. He was not injured by the refusal of the few alleged boycotting dealers to sell equipment. They could offer him nothing more than the selling dealers were already providing. (*Id.* at 7a.)

The court of appeals subsequently reconfirmed its ruling in denying McClure's petition for rehearing and suggestion for rehearing en banc (Pet. App. B., 9a-11a). Underscoring the factual nature of its determination, the court stated: "After a search of the record in this case, we find no evidence at all which discloses that McClure was injured by an alleged post-termination boycott conspiracy" (*id.* at 10a). Thus, "even assuming the existence of an alleged boycott conspiracy," the evidence demonstrates that it "was totally ineffective" and that therefore "the prerequisite causal connection between any alleged violation and injury is absent" (*id.*).

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[2] USI's appellate briefs strenuously contested the jury's threshold finding of a boycott conspiracy on grounds of insufficient evidence, prejudicial hearsay rulings by the trial judge, and improperly suggestive jury instructions. The court of appeals did not review these additional assignments of error since the "complete absence of evidence" to infer injury causally related to the alleged dealer boycott required reversal in any event. (Pet. App. A, 8a.)

ARGUMENT

This case presents no question warranting review by this Court. The only issue presented is factual: whether the evidence supports a reasonable inference of injury to McClure resulting from an alleged dealer boycott. Based on a careful review of the voluminous trial record, the court of appeals unanimously determined that it did not. This factual finding as to the sufficiency of evidence is fully supported by the record and consistent with well-settled principles of antitrust law. Accordingly, further review is both unnecessary and unwarranted.

1. Section 4 of the Clayton Act, 15 U.S.C. § 15 (Pet. 2), provides that a private plaintiff may sue for treble damages only if he has been "injured in his business or property by reason of" an alleged antitrust violation. Accordingly, "[t]o recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *see Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).

The court of appeals properly applied this statutory requirement to the facts presented. Based upon a careful "search of the record in this case" (Pet. App. B, 10a), the court below found insufficient evidence to support a reasonable inference of injury to McClure caused by the alleged post-termination dealer boycott. The court's opinion supports this factual determination with detailed record citations to the testimony of McClure and his wife, as well as McClure's own witnesses, establishing that McClure could and did purchase Scubapro equipment after his termination in unlimited quantities and at dealer cost. (Pet. App. A, 6a-7a.)

Thus, the opinion below documents the following admissions and uncontroverted testimony:

A. McClure (Tr. 667-74), his wife (Tr. 1301-02, 1310-12), and dealer witnesses called by McClure (Tr. 2260-61,

2525) testified that within hours of his termination McClure made arrangements with two authorized dealers to purchase Scubapro equipment; that two additional dealers also began supplying McClure with Scubapro products in the ensuing months; and that these dealer-suppliers sold to McClure at dealer cost and placed no limits on the amount of equipment he could purchase. (Pet. App. A, 6a-7a.)[3]

B. In addition, both McClure (Tr. 668-70) and his wife (Tr. 1312-13, 1344) admitted that, besides the four dealers who were actually supplying them with Scubapro products, at least four more dealers had *affirmatively offered* to ship any additional Scubapro equipment they might request. The McClures, however, never pursued these offers and, indeed, according to his own witness (Tr. 2446), McClure actually turned down at least one such offer. (Pet. App. A, 7a.)

These admissions by McClure and the affirmative testimony of his witnesses fully confirm the court of appeals' finding that McClure "was not injured by the refusal of the few alleged boycotting dealers to sell equipment [since t]hey could offer him nothing more than the selling dealers were already providing" (Pet. App. A, 7a). This purely factual determination presents no issue warranting further review by this Court.

2. Contrary to petitioner's suggestion (Pet. 7-20), the decision below does not present any issue regarding the allocation of the burden of proof in boycott cases as to availability of alternative supplies. The court of appeals did not reverse merely because McClure failed to prove the negative proposition that alternative suppliers were unavailable. Rather, the

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[3] With respect to these supplying dealers, McClure's wife (Tr. 1236-37, 1311; Defendant's Exhibit 82) indicated that shipment time from the most distant dealer source was about the same as it had been previously from the USI factory. Similarly, although he had purchased from the USI factory on a strictly C.O.D. basis, both McClure (Tr. 673) and one of his dealer witnesses (Tr. 2260-61) testified that he could purchase equipment from his supplying dealers on credit or by a variety of other financial arrangements. (Pet. App. A, 7a.)

court expressly found that the *affirmative evidence* in the record—including McClure's own admissions and the uncontroverted testimony of his witnesses—demonstrated the existence of no less than eight alternative suppliers who either would or did sell McClure at dealer cost the Scubapro equipment he needed.[4]

For these same reasons, petitioner's assertion (Pet. 8-9, 15-20) that the decision below conflicts with other courts of appeals' decisions, such as *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), is incorrect. In *Malcolm*, the plaintiff introduced evidence of repeated unsuccessful efforts to obtain alternative supplies of gasoline, while the defendants "did no more than establish that Malcolm failed to contact a few [additional] known suppliers . . . [, but] did not establish that those dealers could or would have sold Malcolm the needed product in sufficient quantities to keep his business alive" (642 F.2d at 863). Here, by contrast, the undisputed record of petitioner's own evidence demonstrates that McClure had four actual dealer sources, and at least four untapped suppliers in reserve, who could, would and did sell McClure all of the Scubapro equipment that he might request.[5]

---

[4] The court below did not base its factual determination on the testimony of "docile franchisees" (Pet. 8) or "the bare, uncorroborated deposition statements of some authorized dealers" (Pet. 25) that they would have sold equipment to McClure if he had called them. As documented by the supporting record citations in its opinion (Pet. App. A, 6a-7a), the court relied almost exclusively on the testimony of McClure (Tr. 667-74), McClure's wife (Tr. 1301-02, 1310-13), and witnesses Maynard (Tr. 2525), Reece (Tr. 2260-6), and Copeland (Tr. 2446), whose deposition testimony was originally taken and introduced at trial by McClure.

[5] Similarly, there is no conflict between the decision below and the Fourth Circuit's decision in *Wilder Enterprises* v. *Allied Artists Pictures Corp.*, 632 F.2d 1135, 1142-43 (4th Cir. 1980), where the plaintiff introduced "direct evidence" that he and other independent film exhibitors had been denied access to first-run films from which a

3. The factual and legal analysis of the court below is also consistent with this Court's decision in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). Petitioner's assertion that *Payne* reflects an "[u]nstated but implicit . . . recognition that proof of violation is an absolute prerequisite to determining impact" (Pet. 20) overstates the case. To the contrary, the *Payne* decision "*emphasize[d]* that even if there has been a violation of the [antitrust laws, the treble damage plaintiff] is *not* excused from its burden of proving antitrust injury and damages" (451 U.S. at 568, emphasis added). Thus, as the court of appeals recognized (Pet. App. B, 11a), *Payne* actually confirms that causation of "injury in fact" is both a separate and essential element of a private treble damage suit.

A second issue in *Payne*, and one which sharply divided the Court, was whether the plaintiff had in fact presented sufficient evidence of injury to sustain an award of treble damages. Based on a review of the *particular factual record in that case*, the *Payne* majority found it "a close question whether petitioner's evidence would be sufficient to support a jury award even under our relaxed damage rules" (451 U.S. at 567). The majority declined to apply those more lenient rules, however, where there was no assurance that the defendant had actually violated the antitrust laws. Because the record presented such a "close question" as to the sufficiency of the plaintiff's injury evidence which could possibly turn upon whether a relaxed standard of proof were permitted, the *Payne* majority returned the case to the court of appeals for determination of the substantive violation issue. (*Id.* at 568.)[6]

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jury could infer that further efforts to obtain such films would have been futile. In the present case, McClure and his witnesses conceded that McClure's efforts to obtain Scubapro products had not been futile and, indeed, that McClure had located more dealer-suppliers, both actual and in reserve, than he needed.

[6] Although the Court ruled unanimously that proof of "actual injury" is an independent prerequisite for treble damage recovery, four dissenting Justices found "no basis for this Court undertaking to second-guess the Court of Appeals as to the sufficiency of evidence."

In its opinion below, the court of appeals specifically addressed petitioner's argument that *Payne* invariably requires a ruling on the question of substantive violation before reaching the independent "injury" element (Pet. App. B, 10a-11a). Based upon the particular factual record *in this case*, the court held: "It is obvious to us that even assuming the existence of an alleged boycott conspiracy, it was totally ineffective because there was no injury to McClure. Under these circumstances, a substantive ruling would serve no useful purpose."[7] (*Id.* at 10.) In this way, the court below confirmed that the evidence in this case on absence of injury is so compelling that, even assuming a violation, McClure's treble damage claim must fail. This purely factual determination as to sufficiency of evidence again presents no occasion for further review by this Court.

Thus, the dissent viewed the court of appeals' findings as "plainly correct" and would have affirmed the dismissal of plaintiff's complaint for failure to prove the fact of antitrust injury. (451 U.S. at 569-70.)

[7] A ruling on the substantive violation issue would have required the court of appeals to address all of USI's additional assignments of error concerning overly suggestive jury instructions, prejudicial and inflamatory hearsay, and insufficient evidence of a boycott conspiracy. USI submits that, for each of these additional reasons, the outcome below would have been no different.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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